

EXHIBIT #22
TO
DEYOUNG DECLARATION

WILMERHALE

July 6, 2006

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Sandra L. Bell
 Acting Assistant Commissioner,
 Office of Regulations and Rulings
 U.S. Customs and Border Protection
 1300 Pennsylvania Avenue, N.W.
 Washington, D.C. 20229

Re: *FOIA Appeal: Case No. DIS-2-OFO: FP DG 2006F0783*

Dear Assistant Commissioner Bell:

On April 25, 2006 Amnesty International USA^{1/} ("Amnesty") and Washington Square Legal Services ("WSLS") filed two requests for information under the Freedom of Information Act regarding detainees secretly transferred or held by the United States Government, including "Ghost Detainees/Prisoners," "Unregistered Detainees/Prisoners" and "CIA Detainees/Prisoners" ("the Requests"). Your agency, the Department of Homeland Security, U.S. Customs and Border Protection, Office of Field Operations ("Office of Field Operations"), assigned the Requests case number DIS-2-OFO: FP DG 2006F0783 and responded to the Requests on June 1, 2006.[^{2/}] In your response, you enclosed four (4) pages of responsive documents, redacted pursuant to exemptions 5 U.S.C. §552(b)(2) and (b)(7)(C). Copies of the Requests and your response letters are attached. *See Exhibits A-C.*

Pursuant to 5 U.S.C. §552(a)(6), Amnesty and WSLS hereby appeal the adequacy of the Office of Field Operations' search for relevant documents. In its reply, your agency does not provide any information about its search methods or indicate that your agency conducted a search pursuant to both of the Requests. This response therefore does not adequately demonstrate that the Office of Field Operations complied with its FOIA obligations and is insufficient to allow Amnesty and WSLS to verify whether its search was adequate or reasonable.^{3/}

^{1/} Amnesty International USA is the U.S. Section of Amnesty International. *See* <http://www.amnestyusa.org/about/>.

^{2/} It is unclear from your office's June 1, 2006 letter which of the Requests the Office of Field Operations was responding to or whether the letter and included documents were intended to serve as a response to both of the Requests.

^{3/} "The fundamental principle animating FOIA is public access to government documents. Accordingly, (courts) require agencies to make more than perfunctory searches, and . . . to follow through on obvious leads to discover requested documents. An agency fulfills its obligations under FOIA if it can demonstrate beyond material doubt that its search was 'reasonably calculated to uncover all relevant documents.'" *Valencia-Lucena v. U.S. Coast Guard*, 180 F. 3d 321, 326 (DC Cir. 1999).

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As an initial matter, as noted in the Requests, there have been numerous reports of detainees secretly transferred or held by the United States Government, including “Ghost Detainees/Prisoners,” “Unregistered Detainees/Prisoners” and “CIA Detainees/Prisoners.”^{4/} Since the Requests were filed, there have been numerous recent additional reports of this practice.^{5/}

^{4/} See Josh White, *Army, CIA Agreed on ‘Ghost’ Prisoners*, WASH. POST, Mar. 11, 2005, at A16. See also Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake: German Citizen Released After Months in Rendition*, WASH. POST., Dec. 4, 2005; Brian Ross and Richard Esposito, *Exclusive: Sources Tell ABC News Top Al Qaeda Figures Held in Secret CIA Prisons*, ABC NEWS, Dec. 5, 2005, at <http://abcnews.go.com/WNT/Investigation/story?id=1375123>; Jane Mayer, *A Deadly Interrogation: Can the C.I.A. Legally Kill a Prisoner?*, NEW YORKER, Nov. 14, 2005, at 44 (discussing the practice, particularly with respect to the death of Manadel al-Jamadi); Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1. See also the following Department of Defense documents released to the American Civil Liberties Union (ACLU) pursuant to a *Freedom of Information Act* request, all available at <http://www.aclu.org/torturefoia/released/030905/>: Transcript of deposition of Brig. Gen. Janis L. Karpinski, Appendix to Fay/Jones/Kern Report (July 18, 2004); Statement of MNF-I, C2, IMIR CW2, Annex to Fay/Jones/Kern Report (June 16, 2004); Sworn Statement of E-5, 519th MI Bn, Annex to Fay/Jones/Kern Report (June 4, 2004); Sworn Statement of 372nd MP Co SPC, Annex to Fay/Jones/Kern Report (May 7, 2004); Sworn Statement of 372nd MP Co SPC, Annex to Fay/Jones/Kern Report (May 7, 2004); Sworn Statement of [UNREADABLE], Annex to Fay/Jones/Kern Report; Sworn Statement of Deputy CJ2, CJTF-7, Annex to Fay/Jones/Kern Report; Sworn Statement of SGT, 372nd MP, Camp Victory, Annex to Fay/Jones/Kern Report (May 7, 2004); Sworn Statement of SPC/E4, B Co., 66th MI Group, 202nd MI BN, Annex to Fay/Jones/Kern Report (May 24, 2004); Sworn Statement of SGT, Member of GTMO team, “Shut Up Group,” Annex to Fay/Jones/Kern Report (June 4, 2004); Sworn Statement of CW2, A/519th MI Bn, Annex to Fay/Jones/Kern Report (May 19, 2004); Sworn Statement of SGT, 372nd MP Co, Annex to Fay/Jones/Kern Report (May 7, 2004); Statement of B/Co, 470th MI Grp. SGT, Annex to Fay/Jones/Kern Report (May 18, 2004). See further HUMAN RIGHTS FIRST, BEHIND THE WIRE: AN UPDATE TO *ENDING SECRET DETENTIONS* 6 (2005), available at http://www.humanrightsfirst.org/us_law/PDF/behind-the-wire-033005.pdf (providing overview of the practice of ghosting in military facilities); HUMAN RIGHTS WATCH, THE UNITED STATES’ DISAPPEARED: THE CIA’S LONG-TERM “GHOST DETAINEES” 5-15 (2004), available at <http://www.hrw.org/backgrounder/usa/us1004/us1004.pdf> (outlining practice of keeping CIA prisoners in military detention generally).

^{5/} See, e.g., Jan Sliva, *EU concedes rendition flights took place*, The Herald, (June 28, 2006); Ike Seamans, *Above the law*, The Miami Herald, (June 25, 2006); *MIDDLE EAST: Region still lacks support for torture victims, say observers*, Reuters Foundation, (June 25, 2006); *The Detention Dilemma*, The Washington Post, (June 19, 2006); Barrie Dunsmore, *Ugly portrait emerges dot by dot*, Times Argus, (June 18, 2006); Josh White, *Bad Advice Blamed For Banned Tactics*, The Washington Post, (June 17, 2006); Anemona Hartocollis, *Judges Press CIA Lawyer Over Withheld Documents*, The New York Times, (June 13, 2006); *Court Weighs ACLU Request on CIA Terror Documents*, New York Sun, (June 13, 2006); Larry Neumeister, *Court Urges to Protect CIA Detention Info*, Guardian Unlimited (June 13, 2006); *Euro MP’s to Extend Probe Into CIA Activities*, Expatica, (June 13, 2006); *Court Will Investigate Alleged CIA Flights*, Los Angeles Times, (June 13, 2006); Jeremy Smith, *EU Lawmakers Back Report on CIA Terror Kidnapping*, Reuters, (June 12, 2006); Jan Sliva, *Probe of CIA Prisons Implicates EU Nations*, Forbes, (June 7, 2006); see further Committee on Legal Affairs and Human Rights, *Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states*, Draft report – Part II (Explanatory memorandum), 7 June 2006; Council of Europe, Parliamentary Assembly, Resolution 1507 *Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states* (2006).

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Amnesty and WSLS have reason to believe that the Office of Field Operations is involved in these programs and that it is likely that the agency possesses additional documents responsive to the Requests. We therefore respectfully request that you conduct a more thorough search of your files and provide a more detailed explanation of your search methods.^{6/}

As an Assistant Commissioner's Office within the U.S. Customs and Border Protection (CBP), the Office of Field Operations plays a key role in the U.S. Government's anti-terrorism efforts. The CBP is an agency of the Department of Homeland Security and is "responsible for protecting our nation's borders in order to prevent terrorists and terrorist weapons from entering the United States, while facilitating the flow of legitimate trade and travel."^{7/} Specifically, the National Targeting Center (NTC), which was established under the Office of Field Operations in 2001, is "the centralized coordination point for all of [the CBP's] anti-terrorism efforts. Using sophisticated information-gathering techniques and intelligence, the NTC provides target-specific information to field offices ready to act quickly and decisively."^{8/} In performing this function, the NTC "coordinates with other federal agencies such as U.S. Coast Guard, Federal Air Marshals, Federal Bureau of Investigation, Transportation Security Administration, and the Departments of Energy and Agriculture."^{9/}

The documents produced by the Office of Field Operations indicate that you have records concerning at least one detainee held in the "war on terror": Yasser Hamdi. These documents provide compelling evidence that Office of Field Operations is in possession of records concerning INS engagement^{10/} with other "war on terror" detainees.^{11/} Given the fact that the

^{6/} See *Oglesby v. U.S. Dept of the Army*, 920 F 2d 57, 68 (DC Cir. 1990) (the agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested).

^{7/} See Department of Homeland Security website, available at <http://www.dhs.gov/dhspublic/display?theme=9>)

^{8/} See Linda Kane, *A new team against terrorism*, Customs and Border Protection TODAY, June/July 2003, available at http://www.cbp.gov/xp/CustomsToday/2003/june_july/; see also *Executive Summary: CBP Actions Taken Since 9/11*, available at http://www.cbp.gov/linkhandler/cgov/toolbox/about/accomplish/post911accomplish_exec_summ.ctt/post911accomplish_exec_summ.doc

^{9/} See *Executive Summary: CBP Actions Taken Since 9/11*, available at http://www.cbp.gov/linkhandler/cgov/toolbox/about/accomplish/post911accomplish_exec_summ.ctt/post911accomplish_exec_summ.doc

^{10/} On March 1, 2003, most services formerly provided by the Immigration and Naturalization Service (INS) were transitioned into the Department of Homeland Security.

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Office of Field Operations has documents related to Mr. Hamdi, the extent of its role in the Department of Homeland Security's anti-terrorism efforts, and the number of individuals who reportedly have been subject to secret or irregular transfer and/or detention by the U.S. Government.^{12/} it is likely that your office possesses documents responsive to the Requests pertaining to individuals other than Mr. Hamdi.

This conclusion is further supported by several news articles and websites reporting the involvement of the CBP (or its predecessor agency, the INS, where applicable) with other detainees who have been secretly or irregularly apprehended, transferred or detained. For example, Khaled El-Masri (a German citizen currently challenging in federal court his alleged secret detention by the U.S. government) was reportedly denied entry to the United States at Hartsfield International Airport, Atlanta, Georgia on December 3, 2005 by CBP.^{13/} News sources suggest that there was information about El-Masri that prevented his entry.^{14/} It is likely

^{11/} See *Campbell v. U.S. Dept. of Justice*, 164 F.3d 20, 28 (DC Cir. 1998) (FBI search was inadequate once the FBI discovered information suggesting the existence of documents that it could not locate without expanding the scope of its search: "an agency has discretion to conduct a standard search in response to a general request, but it must revise its assessment of what is 'reasonable' in a particular case to account for leads that emerge during its inquiry").

^{12/} While the exact number of persons subjected to secret or irregular apprehension, transfer or detention is unknown, estimates of the number of persons rendered vary from around one hundred to several thousand. See Center for Human Rights and Global Justice, *Beyond Guantánamo: Transfers to Torture One Year After Rasul v. Bush* (New York: NYU School of Law, 2005) at 3. With respect to secret detention, human rights organizations have identified by name 29 individuals who they believe are held in secret detention and have stated that there is likely many more. See WITNESS, *Outlawed: Extraordinary Rendition, Torture and Disappearances in the 'War on Terror'*, http://www.witness.org/index.php?option=com_rightsalert&Itemid=178&task=view&alert_id=49, released June 26, 2006. See also Center for Human Rights and Global Justice, *Fate and Whereabouts Unknown: Detainees in the "War on Terror"* (New York: NYU School of Law, 2005) available at <http://www.nyuh.org/docs/Whereabouts%20Unknown%20Final.pdf>; Human Rights Watch, List of "Ghost Prisoners" Possibly in CIA Custody, <http://hrw.org/english/docs/2005/11/30/usdom12109.htm> (last updated Dec. 1, 2005).

^{13/} On December 6, 2005, El-Masri filed suit in the U.S. District Court for the Eastern District of Virginia alleging that on December 31, 2003 he was "...forcibly abducted while on holiday in Macedonia, detained incommunicado, handed over to United States agents, then beaten, drugged, and transported to a secret prison in Afghanistan, where he was subjected to inhumane conditions and coercive interrogation and was detained without charge or public disclosure for several months." (see *El-Masri Complaint*, 12/06/05, available at http://www.aclu.org/images/extraordinaryrendition/asset_upload_file829_22211.pdf, para. 1[0]). His "processing" was by the CBP: see Letter from U.S. Customs and Border Protection to Ms. Ann Beeson, ACLU: Exhibit H to Declaration of Khaled El-Masri in Support of Plaintiff's Opposition to the United States' Motion to Dismiss or, in the Alternative, for Summary Judgment, available at http://www.aclu.org/pdfs/safefree/elmasri_decl_exh.pdf

^{14/} See Scott Shane, *German Held in Afghan Jail Files Lawsuit*, N.Y. TIMES, Dec. 7, 2005 at A25 (noting that CBP spokeswoman Kristi Clemens had "confirmed that Mr. [El-] Masri was denied entry" and that it was "based on information received from other American agencies"); Glenn Kessler, *Rice to Admit German's Abduction Was an*

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that information possessed by the CBP concerning his secret detention could have prevented this entry.

In another example, it has been reported that INS officials were involved in several stages of the initial detention, questioning, and decision to remove Maher Arar, a Syrian-born Canadian citizen who was taken into custody by officials from the FBI and INS while in transit at John F. Kennedy International Airport in September 2002 and kept in an administrative facility (the Metropolitan Detention Center in Brooklyn) for thirteen days prior to being transported to Jordan and then Syria.^{15/}

Finally, the CBP website also indicates that the NTC played a role in the identification of Jose Padilla, who like Mr. Hamdi, is a U.S. citizen who was detained in the U.S. as an “enemy combatant.”^{16/}

Error, Wash. Post, Dec. 7, 2005 at A18 (stating that El-Masri was “turned away because his name was on a Homeland Security watch list”).

^{15/} See lawsuit filed by Arar against Attorney General John Ashcroft and other U.S. officials, Larry D. Thompson (then Acting Attorney General), J. Scott Blackman (then Regional Director of the Immigration and Naturalization Services for the Eastern District), Edward J. McElroy (formerly District Director for the Immigration and Naturalization Services for the New York City District and presently District Director of U.S. Immigration and Customs Enforcement), Robert Mueller (Director of the Federal Bureau of Investigation), and others: Complaint and Demand for Jury Trial, filed with the U.S. District Court for the Eastern District of New York in *Arar v. Ashcroft, et al.*, available at http://www.ccr-ny.org/v2/legal/september_11th/docs/ArarComplaint.pdf. This complaint specifically refers to INS officials (see *Arar v. Ashcroft*, para. 38, 43, 46, 47) or more generally to immigration officials or officers (see *Arar v. Ashcroft*, paras. 26, 27, 31, 35, 41). See also Dept. of State, Question Taken at October 6, 2003 Press Conference, available at <http://www.state.gov/r/pa/prs/ps/2003/24965.htm>; Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, Sept. 15, 2005, argument of Lorne Waldman (Attorney to Arar) available at <http://www.stenotran.com/commission/maherarar/2005-09-12%20volume%2046.pdf> [11719-11728] (detailing information sharing between Canada and INS personnel); Dana Priest & Joe Stephens, *Secret World of U.S. Interrogation: Long History of Tactics in Overseas Prisons Is Coming to Light*, WASH. POST, May 11, 2004, at A1.

^{16/} Linda Kane, *A new team against terrorism*, Customs and Border Protection TODAY, June/July 2003, available at http://www.cbp.gov/xp/CustomsToday/2003/june_july/ (“Last spring, an NTC staffer spotted the name of Jose Padilla on a manifest of flights from Cairo to Chicago via Zurich. Padilla was allegedly working with al Qaeda to explore the feasibility of setting off a “dirty bomb,” a conventional bomb salted with radioactive material, in an American city. Padilla is now in U.S. military custody as an enemy combatant”). Padilla was arrested at Chicago’s O’Hare International Airport on May 8, 2002 after an international flight: see generally *Profile: Jose Padilla*, BBC NEWS, Nov. 22, 2005, available at <http://news.bbc.co.uk/1/hi/world/americas/2037444.stm>.

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Based upon the evidence of the Office of Field Operations' broad anti-terrorism responsibilities, general media reports and specific press accounts of the agency's connection to particular detainees, as well as the documentation provided by the agency itself, we believe that the Office of Field Operations possesses more records documenting its involvement with ghost/unregistered detainees than it has disclosed. We look forward to your reply to this appeal within **twenty (20) working days**, as required under 5 U.S.C. §552(a)(6)(A)(ii).

Sincerely,

Curt Goering Jr. cr

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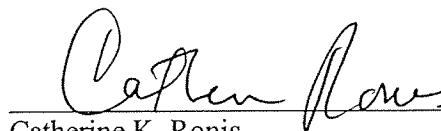
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